Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

In Re: JAMES CONSTANT,

Appeal Court Nos
92-55891, 92-56045

Debtor

JAMES CONSTANT,

Petitioner

v.

STEPHEN V. WILSON, District Judge;
MANUEL REAL, Chief District Judge;
ROBERT P. AGUILAR, District Judge;
OSCAR DAVIS, Appeals Judge;
WILSON COWEN, Appeals Judge;
EDWARD SMITH, Appeals Judge;
HELEN NIES, Appeals Judge;
PAULINE NEWMAN, Appeals Judge;
HOWARD MARKEY, Chief Appeals Judge;
PAUL MICHEL, Appeals Judge;
UNITED STATES OF AMERICA.

Respondents.

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JAMES CONSTANT

Appeal Court No
92-55995

Petitioner

v.

STEPHEN V. WILSON, District Judge;
MANUEL REAL, Chief District Judge;
ROBERT P. AGUILAR, District Judge;
OSCAR DAVIS, Appeals Judge;
WILSON COWEN, Appeals Judge;
EDWARD SMITH, Appeals Judge;
HELEN NIES, Appeals Judge;
PAULINE NEWMAN, Appeals Judge;
HOWARD MARKEY, Chief Appeals Judge;
PAUL MICHEL, Appeals Judge;
UNITED STATES OF AMERICA.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James Constant
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Pro-per Petitioner

QUESTIONS PRESENTED

Should this Court resolve direct conflicts between the court of appeal's decisions and decisions of this Court and other Circuit Courts on the following matters:

1. Whether affirmative defenses of patent invalidity and judicial immunity are claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b).

2. Whether affirmative defenses of patent invalidity and judicial immunity are claims for purposes of jurisdiction under 28 USC 1338,1331,1343,1334 and 28 USC 157(b)(2)(B) and (C).

3. Whether affirmative defenses of patent invalidity and judicial immunity offend due process when they deprive petitioner's right to be heard on claims of his complaints.

4. Whether the appeal court can make its decision without an inquiry into the question of subject matter jurisdiction raised by petitioner in the actions.

5. Whether judgements in earlier cases may be subsequently attacked for lack of subject matter jurisdiction when it appears that the earlier judgements were manifest abuses of authority or have seriously impaired the public interest by deciding complaints on the basis of affirmative defenses of patent invalidity and judicial immunity or have infringed due process of a party's right to be heard on claims of a complaint.

6. Whether a judge is not immune for actions, though judicial in nature, are taken in the complete absence of all jurisdiction of the subject matter.

7. Whether a judge is not immune for violations of constitutional and civil rights.

8. Whether a judge is subject to declaratory and injunctive relief.

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NO. _____

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Respondents.

JAMES CONSTANT,

Appeal Court No 92-55995

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STEPHEN V. WILSON, District Judge;
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HELEN NIES, Appeals Judge;
PAULINE NEWMAN, Appeals Judge;
HOWARD MARKEY, Chief Appeals Judge;
PAUL MICHEL, Appeals Judge;
UNITED STATES OF AMERICA.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, James Constant, respectfully prays that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on December 3, 1993 affirming the district court's dismissal of complaints on grounds of judicial immunity without considering important exceptions to that rule which allow suits against judicial officers when they act in the clear absence of all jurisdiction of the subject matter.

OPINIONS BELOW

The unpublished written opinion of the Court of Appeals appears in Appendix A to this Petition. The three Orders of the District Court of the Central District of California dismissing complaints appear in Appendix B to this Petition.

JURISDICTION

The Court of Appeal's Opinion in this matter was filed on 3 December, 1993. A timely petition for Rehearing and Suggestion that Case is Heard In Banc was filed on 16 December, 1993. The Court of Appeal's denial of the Petition for Rehearing was issued on 10 January, 1994 and is set forth in Appendix C. The Court's jurisdiction is invoked under Title 28, USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 54(b) involved in the earlier and instant cases is set forth in Appendix D.

Jurisdictional Statute 28 USC 1338 involved in earlier Cases 1,3,4; Jurisdictional Statutes 28 USC 1331 and 1343 involved in earlier Case 2 and in instant Case 3; and Jurisdictional Statutes 28 USC 1334 and 28 USC 157(b)(2)(B) and (C) involved

in instant Cases 1 and 2 are set forth in Appendix E.

Amendment V to United States Constitution involved in earlier Case 2 and instant cases is set forth in Appendix F.

STATEMENT OF THE CASE

In earlier (pre-bankruptcy) Cases 1-4, petitioner's complaints were dismissed on issues of affirmative defenses[1]. Petitioner filed for bankruptcy and brought instant Cases 1-3[2].

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[1] Earlier Case 1 made claims for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts found 2 of petitioner's patents invalid under Rule 56. *Constant v. Advanced Micro Devices, Inc.* (CAFC 88) 848 F.2d 1560, 7 USPQ2d 1057 *cert. den.* 488 U.S. 892 (1988).

Earlier Case 2 made claims that the judgement in earlier Case 1 was procured by fraud, and claims for violations of constitutional, and civil rights. The district court had jurisdiction pursuant to 28 USC 1331 and 1343. The courts dismissed the case on issues of defense under Rule 56 (collateral estoppel) and Rule 12(b) (absolute immunity). Cases CV 87 6766R/7046R/6592R/7315R Central District, California 1987) *aff'd* CAFC 88-1195 to 88-1198 CAFC 8/25/88 unpublished memorandum decision.

Earlier Case 3 made claims for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts dismissed the case under Rule 41(b). *Constant v. Advanced Micro Devices, Inc.* Case CV 88 0784 SVW Central District California CAFC 89-1122 *aff'd* 4/11/89. 873 F.2d 1451. S Ct 88-1933 *cert. den.* 10/2/89. ___U.S___, 110 S.Ct. 62.

Creditor's earlier Case 4 made claims for invalidity of petitioner's patents. Petitioner counter-claimed for patent infringement. The district court had jurisdiction pursuant to 28 USC 1338. The courts found petitioner's patent invalid under Rule 56. *Advanced Micro Devices, Inc. v. Constant* C 88 20101 RPA Northern District, California 1988 *aff'd* CAFC 89-1432.

[2] Instant Cases 1 and 2 were filed in the bankruptcy court. Instant Case 3 was filed in the district court.

Instant Case 1 was entitled Objections To Creditor's claims Based On Void Judgements Obtained Through Fraud. The bankruptcy court had jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(2) (B) and (C). Objections were made under Bankruptcy Rule 3007. Appeal Court No. 92-55891.

Instant Case 2 was entitled Declaratory Judgements That Statutes 28 USC 2072,331,137, Federal Rules of Civil Procedure 11,12(b),41(b),56 and General Order 224[3] Are Unconstitutional. The bankruptcy court had jurisdiction pursuant to 28 USC 1334 and 28 USC 157(b)(2)(B) and (C). Appeal Court No. 92-56045.

Instant Case 3 was entitled Deprivation Of Legal And Constitutional Rights, Conspiracy To Obstruct Justice And To Deprive Privileges And Immunities, Neglect To Prevent Conspiracy, And Void Judgements. The district court had jurisdiction pursuant to 28 USC 1331, and 28 USC 1343(a)(1) and(2). Appeal Court No. 92-55995.

The complaint in instant Case 1 makes four counter-claims objecting to creditor's claims against the estate[4]:

1. In earlier Cases 1-4 the courts lacked subject matter jurisdiction.

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[3] Cited statutes were used by the respondents to gain jurisdiction to dismiss the earlier and instant complaints and to sanction petitioner.

[4] A claim objection may raise issues under federal or state law or issues running to the allowability of creditor's claims. When joined with a counterclaim it is filed as an adversary proceeding pursuant to Bankruptcy Rule 7001 which provides for equitable relief including relief provided by

2. In earlier Case 3 the courts lacked personal jurisdiction over creditors, and in earlier Case 4 the courts lacked personal jurisdiction over petitioner.

3. In earlier Cases 1-4 judgements against petitioner were obtained in violation of due process.

4. In earlier Cases 1-4 judgements against petitioner were obtained by fraud.

The complaint in instant Case 2 makes 10 counter-claims, namely, that statutes 28 USC 2072,331,137, Federal Rules of Civil Procedure 11,12(b),41(b),56 and General Order 224 are unconstitutional, that the judiciary's rule-making power is unconstitutional, and that federal rules encroach petitioner's substantive rights.

The complaint in instant Case 3 makes 20 claims for deprivation of legal and constitutional rights (14 claims), conspiracy to obstruct justice and to deprive privileges and immunities (3 claims), neglect to prevent conspiracy (1 claim), void judgements (1 claim), and purging defendants (1 claim).

In its Memorandum, under Dismissal of the Complaint, the Appeals Court held that petitioner's instant actions were barred by judicial immunity[5].

Bankruptcy Rule 9024 [Relief from Judgement or Order]. See *Collier On Bankruptcy 15th ed. Vol. 8* Chapters 3007,7001,9024. Whether or not a claim is to be allowed is a judicial determination. See *Heiser v. Woodruff* 327 US 726 (1946).

[5] Because of the relative importance of issues and space limitations, other issues decided by the appeals court (Withdrawal of Reference, and Pre-filing Order) are not addressed by petitioner here.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reasons that the opinions below in the earlier and instant cases conflict with previous decisions of this Court and with the decisions of other Circuits.

The following points of facts were overlooked by the appeals court:

1. Claims in the instant complaints are not identical to claims in the earlier cases. *21 Fed. Proc. LEd* 51:201(citations for rule of identical claims); *Scott v. Kuhlman* (CA9 1984) 746 F2d 1379.

2. Parties in the instant complaints are not identical to parties in earlier Cases 1,3,4. With one exception(Judge Wilson), parties in the instant complaints are not identical to parties inearlier Case 2. *21 Fed. Proc. LEd* 51:206(citations for rule of identical parties); *Scott v. Kuhlman* (CA9 1984) 746 F2d 1379.

3. No claims in earlier Cases 1-4 or in the instant cases were actually adjudicated on merits[6]. *21 Fed. Proc. LEd* 51:193, 201 (citations for rule of adjudicating actual claims); *Golden v.*

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[6] In earlier Case 3 petitioner moved to dismiss the complaint for lack of personal jurisdiction. The motion was not decided by the district court. See complaint in instant Case 1 par. 61. In earlier Case 4 petitioner filed papers objecting to venue. Objections were not decided by the district court. See complaint in instant Case 1 par. 72.

Pacific Maritime Association (CA9 1986) 786 F2d 1425, 40 BNA FEP Cas 968. Earlier Cases 1,3,4 were determined on affirmative defenses of patent invalidity. Earlier Case 2 was determined on affirmative defenses of collateral estoppel (as to non-judicial parties) and judicial immunity (as to judicial parties)[7]. The instant cases were decided on the affirmative defense of judicial immunity.

4. No hearings on claims were held in earlier and instant cases. *Allen v. McCurry* (1980) 449 US 90, 66 LEd2d 308, 101 SCt 411 (citations for rule of due process).

The following points of law were overlooked by the appeals court:

1. Whether affirmative defenses of patent invalidity in earlier Cases 1,3,4, of collateral estoppel and judicial immunity in earlier Case 2, and of judicial immunity in the instant cases are claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b).

2. Whether affirmative defenses of patent invalidity in earlier Cases 1,3,4, of collateral estoppel and judicial immunity in earlier Case 2, and of judicial immunity in the instant cases are claims for purposes of jurisdiction under 28 USC 1338 in earlier patent Cases 1,3,4; under 28 USC 1331,1343 in earlier non-patent Case 2 and in instant non-patent Case 3; and

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[7] Fraud, constitutional, and civil rights claims in earlier Case 2 were different from patent claims in earlier Case 1. Defendant Judge Real did not preside over earlier patent Cases 1,3,4.

under 28 USC 1334 and and 28 USC 157(b)(2)(B) and (C) in instant Cases 1,2.

3. Whether affirmative defenses in the earlier and instant cases, which deprive petitioner's right to be heard on claims of his complaints, offend due process.

4. Whether petitioner's challenges to the court of appeal's jurisdiction in the instant cases and the public interest of holding courts to their prescribed jurisdiction render judgements voidable in the instant and earlier cases.

5. Whether judges are not immune for actions, though judicial in nature, are taken in the complete absence of all jurisdiction of the subject matter.

6. Whether judges are not immune for violations of constitutional and civil rights.

7. Whether judges are subject to declaratory and injunctive relief.

A. Judgements In Earlier Cases And In Instant Cases Are Not Final

1. The entry of an order under Federal Rule of Civil Procedure 58 is subject to the provisions of Federal Rule of Civil Procedure 54(b) governing multiple claims and parties. A procedural defense not necessary for resolving claims is not a claim for purposes of Rule 54(b).

2. Judgements must be determined on the merits of a cause of action. *Sears Roebuck & Co. v. McKay* (1956) 351

US 427, 100 LEd 1297, 76 SCt 895, 1956 CCH Trade Cases 68370; *Curtis Wright Corp. v. General Electric Co.* (1980) 446 US 1, 64 LEd2d 1, 100 SCt 1460, 29 FR Serv2d 221.

3. An affirmative defense does not present claims for relief under Rule 54(b). *Flynn & Emrich Co. v. Greenwood* (CA4 1957) 242 F2d 737, *cert. den.*, 353 US 976, 1 LEd2d 1137, 77 SCt 1060; *Smith v. Benedict* (CA7 1960) 279 F2d 211, 3 FR Serv2d 851; *First Federal Savings & Loan Asso. v. Peterson* (ND Fla 1981) 521 FSupp 416.

4. It is necessary to adjudicate the claims for four reasons, first, to fulfill the requirements for adjudicating claims under Rule 54(b), second, to fulfill the requirements for adjudicating claims under 28 USC 1338,1331,1343,1334 and 28 USC 157(b)(2)(B) and (C), third, to protect the right to be heard on claims of a complaint and, fourth, to determine whether sanctions are warranted under Federal Rule of Civil Procedure 11 for claims in papers actually signed and filed by petitioner[8].

B. Judgements In Earlier Cases And In Instant Cases Based On Affirmative Defenses Lack Jurisdiction

1. In *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811, in a case involving the same Federal Circuit judges who affirmed earlier Cases 1-4, this Court held that a patent law defense of patent validity is not a claim (cause

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[8] While sanctions are not at issue here, the respondents have repeatedly sanctioned petitioner on issues of defense in papers not signed or filed by petitioner.

of action) for purposes of jurisdiction under 28 USC 1338. More generally, this Court held that a defense or procedure is not a claim under 28 USC 1331 and 28 USC 1343. Clearly, therefore, the earlier non-bankruptcy Cases 1-4 and instant non-bankruptcy Case 3 were decided on affirmative defenses without jurisdiction of the subject matter.

2. In instant Case 3, the district court's jurisdiction was under 28 USC1331 [Federal Question] and 28 USC 1343 [Civil Rights]. There is nothing in the record of instant Case 3 that shows that petitioner's constitutional and civil rights claims were adjudicated on the actual merits. In instant Cases 1 and 2, the district court's jurisdiction was under 28 USC 1334 and 28 USC 157(b)(2)(B) [allowance or dissallowance of claims] and (C) [counterclaims against persons filing claims against the estate][9]. There is nothing in the record of instant Cases 1 and 2 that shows that creditor's claims have been judicially determined as allowed or dissallowed or that petitioner's counterclaims against creditor's claims were adjudicated on the actual merits. Therefore, assumming arguendo that petitioner's counterclaims collaterally attacking earlier judgements are without merit, the courts failed their jurisdictional duty to judicially determine whether creditor's claims are allowable. *Heiser, supra.*

3. Earlier Cases 1-4 and the instant cases were decided on issues of defense not claims (causes of action) of the com-

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[9] In the complaint of instant Case 1, paragraphs 4-7 raise issues of the allowance of creditor's claims under 28 USC 157 (b)(2)(B) while the remaining counts raise counterclaims under 28 USC 157(b)(2)(C).

plaint. However, a district court's jurisdiction is over claims not issues of defense. A suit arises under the law that creates the cause of action not from defenses to claims. Jurisdiction is not determined by examining the initial complaint but by ascertaining whether a claim of the complaint was litigated and determined in the case. *Christianson, supra.*

4. In the patent law, invalidity and unenforceability, as well as noninfringement, are merely affirmative defenses. It is well established that federal subject matter jurisdiction may not rest on defenses but must instead rest on affirmative claims of federal rights. *Louisville & Nashville RR Co. v. Mottley* (1908) 211 US 149, 29 SCt 42, 53 LEd 126; *Thiokol Chemical Corp. v. Burlington Industries, Inc.* (CA3 1971) 448 F2d 1328, 1330-31 *cert. den.* 404 US 1019, 92 SCt 684, 30 LEd2d 668 (1972). When questions of patent validity and infringement are raised in the same proceeding the trial court should enter judgement on both. *Simmons Fastener Corp. v. Illinois Tool Works, Inc.* (CAFC 1984) 739 F2d 1573; 222 USPQ 744 (citing *Lindeman; Stratoflex; Medtronic*)

> "Though an invalid claim cannot give rise to liability for infringement, whether it is infringed is an entirely separate question capable of determination without regard to its validity. Because both validity and infringement involve construction of a claim, and because the construction must be the same in determining both, it is desirable to decide both questions at the same time". *Id.*

5. In *Christianson v. Colt Industries* (1988) 108 SCt 2166, 100 LEd2d 811 this Court held:

a. "Statute 28 USC 1338(a) grants the district court's original jurisdiction of any civil action 'arising under' any federal statute relating to patents." *Id* 2168.

b. "Jurisdiction cannot be based on Federal Rule of Civil Procedure 15(b) by deeming the complaint amended." *Id* 2170[10].

c. "The motion for summary judgement raised a patent law issue that Colt's patents were invalid under 35 USC 112. The district court, relying on the Section 112 theory, invalidated nine of Colt's patents. The Federal Circuit reversed." *Id* 2172.

d. "A patent law issue (validity of patents) is not necessary to overall success of a claim." *Id* 2174.

e. "The summary judgement papers focused on the patent law issues of validity, defenses and counterclaims. The patent law focus of the summary judgement papers did not assert a new patent law claim." *Id* 2177.

f. "A court may not in any case extend its jurisdiction where none exists." *Id* 2178.

g. "In their concurring opinion, *Id* 2179-82, Justices Stevens and Blackmun held that the answer to the ques-

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[10] In the earlier cases, in effect jurisdiction was based on Rules 56 (Cases 1,2,4), 12(b) (Case 2), and 41(b) (Case 3).

tion whether a claim arises under the patent laws may depend on the time when the question is asked. If the question is asked at the end of the trial, the answer may be different than if it had been asked at the outset to decide whether a federal district court has jurisdiction to try the case." *Id* 2179.

h. " The question whether a claim arises under the patent laws is similar to the question whether a claim arises under federal law. Section 1338 jurisdiction, like Section 1331 jurisdiction, is over claims not issues. A suit arises under the law that creates the cause of action." *Id* 2180 and Note 1 citations.

i. "Congress did not create an express cause of action to enforce 35 USC 112 of the patent laws, and there is no implied cause of action under Section 112."[11]. *Id* 2180.

j. "Since it seems plain that no implied cause of action exists under Section 112, an attempt at gaining federal court jurisdiction under Section 112 would be rejected under the 'artful pleading' doctrine." *Id* 2180 and Note 2.

k. "To sanction suits for declaratory relief as within the jurisdiction of the district courts because artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective function of the federal judicial system and distort the limited procedural purposes of the Declaratory Judge-

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[11] In earlier Cases 1,3,4, in effect the courts created causes of action under 35 USC 282 providing affirmative defenses of patent invalidity.

ment Act[12]. Artful pleading cannot be invoked on the basis of facts not challenged in the complaint." *Id* 2180 and Note 2 citations.

l. "The district court's opinion might be read as suggesting that whether patent claims are properly before the Federal Circuit on appeal should be determined by examining only the initial complaint and not by ascertaining whether a patent claim was litigated in the case. Such an approach would assume that whether a case 'arises under' the patent laws turns on the same considerations whether one is determining the Federal Circuit's appellate jurisdiction or a district court's original jurisdiction. But although 28 USC 1338(a) provides the basis for both types of jurisdictional assessment, Congress could not have intended the same analysis in both instances." *Id* 2181.

m. " The claim that was actually litigated (patent invalidity) did not arise under the Patent Laws." *Id* 2181.

6. Affirmative defenses are nonjusticiable for the following reasons:

a. Federal courts must consider petitioner's claims in his complaints before they can consider issues of affirmative defenses. A defense rests on something that may or may not happen in the future, namely, whether claims of the complaint

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12 This particular citation by the Court applies to earlier Case 4 in which a creditor's complaint for Declaratory Judgement succeeded in invalidating petitioner's patent solely on issues of defense of patent invalidity.

are proven. If claims of the complaint cannot be proven, the issue of defense is moot. When a defense rests on something that may or may not happen in the future, it is non-justiciable because it is not ripe. *United Public Workers v. Mitchell* (1947) 330 US 75.

b. The central concern in the ripeness doctrine is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. *Wright, Miller & Cooper* 1992 Pocket Part Section 3532 note 1.5 citing *Lewis v. Continental Bank Corp.* (1990) 110 SCt 1249,1255, 494 US 472, 108 LEd2d 400; *Thomas v. Union Carbide Agricultural Products Co.* (1985) 105 SCt 3325,3333, 473 US 568,580, 87 LEd2d 409.

c. In earlier Cases 1-4 and in the instant cases, the courts acted in the clear absence of Article III Sec. 2.1 Constitutional jurisdiction because their judgements rest on affirmative defenses not on affirmative claims of petitioner's federal rights.

C. Judgements In Earlier Cases And In Instant Cases Based On Affirnative Defenses Deprive Petitioner's Rights To Be Heard On Claims Of His Complaints

1. By using procedural rules and affirmative defenses to gain jurisdiction and to defeat petitioner's earlier and instant complaints, the courts have prejudged petitioner's claims in earlier Cases 1-4 and in the instant cases. Where a conflict exists between a federal rule and substantive law the latter are unaffected by the rule, i.e., the rule is of no force and effect

when rights involve substantive law, and jurisdiction *Hanna v. Plummer* (1965) 380 US 460, 14 LEd2d 8, 8 SCt 1136; *Sibbach v. Wilson & Co.* (1941) 312 US 1, 85 LEd 479, 61 SCt 422 *reh. den.* 312 US 713, 85 LEd 1144.

2. The court's judgements, based on procedural defenses, do not replace the constitutional requirement that the procedural question must be necessary to resolve a claim put in issue by petitioner's claims. A procedural rule cannot extend federal court jurisdiction beyond the limits of the Constitution. *Hodgson v. Bowerbank* (1809) 9 US 303, 3 LEd 108; for Supreme Court Background see *US LEd Digest*, Courts paragraph 232.

3. The courts did not give petitioner the opportunity to be heard on his claims in earlier Cases 1-4 and in the instant cases, failed to follow the jurisdictional statutes, failed to make trial of claims, and failed to follow the requirements for making final judgements, determinations of claims, and entry of judgements on all claims and parties.

4. The exclusion of petitioner's evidence[13] is inconsistent with substantial justice of petitioner's right to be heard and to offer evidence on claims of the complaint (causes of action). *United States v. Long* (CA3 1978) 574 F2d 761 *cert. den.* 439 US 985, 58 LEd2d 657, 99 SCt 577; *Whitehurst v. Wright* (CA7 1979) 592 F2d 834.

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[13] See judgements in earlier and instant cases.

5. Even if a court has jurisdiction, a court which proceeds in such an arbitrary or improper manner that its action may be said to constitute a denial of due process, its judgement is void. *Windsor v. McVeigh* (1876) 93 US 274, 23 LEd 914 (with-out hearing or opportunity to be heard). *Winhoven v. U.S.* (CA9 1952) 201 F2d 174, 18 FRServ 60b.26, Case 1 (failing to act on motion); *Great American Trading Corp. v. I.C.P. Cocoa, Inc.* (CA7 1980) 629 F2d 1282 (failure to follow a statute requiring evidentiary trial)[14].

6. The inferior courts must be held to a lawful exercise of their prescribed jurisdiction. *Roche v. Evaporated Milk Asso.* (1943) 319 US 21, 87 LEd 1185, 63 SCt 938; *U.S. Alkali Export Asso. v. U. S.* (1945) 325 US 196, 89 LEd 1554, 65 SCt 1120; *Banker's Life & Casualty Co. v. Holland* (1953) 346 US 379, 98 LEd 106, 74 SCt 145; *Will v. United States* (1967) 389 US 90, 19 LEd2d 305, 88 SCt 269. See also *Schlagenhauf v. Holder* 379 US 104, 13 LEd2d 152, 85 SCt 234; *Gulfstream Aerospace Corp. v. Macayamas Corp.* (1988 US) 99 LEd2d 296, 108 SCt 1133.

D. Petitioner's Challenge To The Court Of Appeal's Jurisdiction And The Public Interest In Holding Courts To Their Prescribed Jurisdiction Render Judgements Voidable In The Instant And Earlier Cases

In the courts below, petitioner made a number of objections including objection to subject matter jurisdiction in the

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[14] In earlier patent cases, the courts failed to act on petitioner's motions for evidentiary trial of claims in complaints.

instant cases[15]. If the jurisdiction of a federal court is questioned the court has the power and the duty, subject to review, to determine the jurisdictional issue. See numerous decisions in *Wright, Miller, Cooper, Federal Practice And Procedure, Jurisdiction 2d* 3536 footnote 2. The district court's and the appeal court's decisions were made without an inquiry into the question of subject matter jurisdiction raised by petitioner. In effect, the appeal court's decision says that a pre-trial disposition of a case under a federal rule issue of defense confers jurisdiction and, therefore, there is no need to inquire into the question of subject matter jurisdiction.

Further, a party may collaterally attack an earlier judgement on grounds of lack of jurisdiction and fraud. *Martin v. Wilks* 109 SCt 2180,2189 (1989). In the complaint, petitioner made a number of objections including objection to subject matter jurisdiction in earlier Cases 1-4. See page 5 and footnote 6 *supra*. The court of appeal's opinion that the earlier cases are res judicata overlooks the public interest. Preclusion should apply unless the petitioner should be afforded the opportunity to reopen the controversy. See *Restatement (Second) of Judgements* 12 Comment d. Assuming that the conditions are met, relief from the earlier judgements ought to be granted under almost all circumstances. See *Restatement (Second) of Judgements* 69 Comment c. Thus, judgements in earlier cases may be subsequently attacked for lack of jurisdiction of subject

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[15] Because this is a direct appeal, the grounds that may be asserted as error are not limited to lack of jurisdiction and fraud. *Martin v. Wilks* 109 SCt 2180,2190 footnote 6.

matter if it appears that

(1) The subject matters of earlier cases were so plainly beyond the court's jurisdiction that their entertaining actions were manifest abuses of authority; or

(2) Allowing the earlier judgements to stand would substantially infringe the authority of other tribunals. See Restatement (Second) of Judgements 69 Comment a.

The judgements in earlier cases were based on affirmative defenses of patent invalidity (earlier Cases 1,3,4) and collateral estoppel (earlier Case 2). See footnote 1, *supra*. For the reasons in Parts A-C *supra*, the court's decisions based on affirmative defenses of patent invalidity and collateral estoppel were plainly beyond the court's jurisdiction under 28 USC 1338 in earlier Cases 1,3,4 and 28 USC 1331,1334 in earlier Case 2 and thus decisions were manifest abuses of authority made in the clear absence of all jurisdiction over the subject matter. Allowing the earlier judgements to stand as precedents would substantially infringe the authority of other courts to decide cases in similar circumstances and would seriously impair the public interest for adjudicating cases based on claims of complaints, if the practice of deciding cases on affirmative defenses alone is allowed to continue. Suits arise under the laws that create causes of action not from defenses to claims. *Christianson, supra.*

E. Judicial Immunity Is Overcome When Actions, Though Judicial In Nature, Are Taken In The Complete Absence Of All Jurisdiction

1. The doctrine of judicial immunity is overcome in three sets of circumstances. First, a judge is not immune from liability for non-judicial action, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, are taken in the complete absence of all jurisdiction. *Mireles v. Waco* 112 SCt 286,288 (1991). Third, a judge is not immune for violations of Constitutional and Civil rights. *Hafer v. Melo* (1991) 112 SCt 358, 116 LEd2d 301.

2. As to the first circumstance, the parties agree that the acts complained of were taken within defendant's judicial capacity. As to the second circumstance, each instant complaint alleges that at all times and all acts named in the complaint, the defendants, singly and in concert with other defendants and creditor's attorneys, acted in the clear absence of all jurisdiction[16]. As to the third circumstance, each complaint repeatedly alleges that the defendants have violated debtor's Constitutional and Civil rights. On a motion to dismiss, the allegations of a complaint are taken as true[17]. *Mireles, supra* 288,289.

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[16] In earlier Cases 1-4 and in the instant cases the court's actions dismissing complaints on issues of defense, though judicial in nature, were taken in the complete absence of all jurisdiction. See Parts A-D *supra*.

[17] The court of appeal's statement, App. 8, that "Constant failed to allege any facts to support these allegations" that defendants were acting in the clear absence of all jurisdiction echoes the district court's statements, App. 16,30,40. However, these statements are clear error because instant complaints allege lack of jurisdiction by reason that "creditor's judgements cover issues of defense not claims. Section 1338 (or 1331) jurisdiction is over claims not issues". See footnote 3 in App.16. See judgements in earlier and instant cases, all of which are based on issues of defense not claims of petitioner's complaints.

F. Judicial Immunity Does Not Bar Constitutional and Civil Rights Claims

1. With or without judicial immunity, federal judges are bound by constitutional guarantees. *Bolling v. Sharpe* (1954) 347 US 497.

2. Judges, prosecutors, and official witnesses are subject to criminal liability under 18 USC 242 for violations of constitutional rights of individuals. *Briscoe v. Lahue* (1983) 460 US 325, 103 SCt 1108, 75 LEd2d 98 footnotes 26 [13b],32 3[18b]. See also *Butz v. Economou* 438 US 494, 98 SCt 2894; *Bell v. Hood* 327 US 678; *Butz v. Unknown Agents* 499 US 388.

3. In *Hafer v. Melo* (1991) 112 SCt 358, 116 LEd2d 301 this Court held that judicial actions which violate the Constitutional rights of individuals may be sued as a cause of action in civil litigation against those performing said acts, without any form of immunity. The 11th Amendment does not bar such suits in federal court. *Id.*

4. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) 403 US 388, 29 LEd2d 619, 91 SCt 1999 this Court held that an implied damages action exists for 4th Amendment violations[18]. In *Davis v. Passman* (1979) 442 US 228, 60 LEd2d 846, 99 SCt 2264 the Court held that a damages action was implied in the Equal Protection guarantee found in the 5th Amendment[19]. *Davis* constituted the

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[18] See Second Claim [Secure from Seizure] in complaint in instant Case 3.

[19] See Count VII [Due Process] in complaint in instant Case 1; See Fifth Claim [Due Process] in complaint in instant Case 3.

Court's first extension of *Bivens* beyond 4th Amendment claims. In *Carlson v. Green* (1980) 446 US 14, 64 LEd2d 15, 100 SCt 1468, in which plaintiffs were allowed to bring an implied action under the 8th Amendment, the Court confirmed that *Bivens*-type actions are available under many constitutional provisions[20]. *Carlson* held that the existence of a remedy against the United States under the Federal Tort Claims Act did not foreclose a *Bivens* action against individual officers alleged to have violated the Constitution.

5. When a federal judge violates the law, he violates the Supremacy Clause and his oath to support the Constitution. He is not acting in an impartial judicial capacity because he becomes a lawbreaker. His actions or inactions then constitute not "error" but actual violations of a person's Civil Rights to due process and equal protection.

6. Accordingly, petitioner's claims in the instant complaints alleging that respondents have violated the Constitution as well as express jurisdictional statutes and federal rules state claims which are not barred by judicial immunity. Simply put, with or without jurisdiction, federal judges are bound by the Constitution and can be sued for violations thereof.

G. Judicial Immunity Does Not Bar Declaratory And Injunctive Relief

The various circuits are not in agreement on the question of whether declaratory and injunctive relief are available against

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[20] See 14 claims for deprivation of constitutional rights in complaint in instant Case 3.

judges. *Mullis v. United States Bankr.Ct.* (CA9 1987) 828 F2d 1385; *Scruggs v. Moellering* (CA7 1989) 870 F2d 376. See the district court's opinion in the matter in footnote 5 of Appendix B1.

H. Conflicts Of Decisions

1. The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that the affirmative defense of judicial immunity is a claim for purposes of Rule 54(b) in the instant cases[21]. This is contrary to the decisions of this Court and other Circuits. See citations in Part A *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decisions in *Sears Roebuck, supra* and *Curtis Wright, supra* that "judgements must be determined on the merits of a cause of action", **second**, to explicitly rule that affirmative defenses of patent invalidity and judicial immunity are not claims for purposes of final judgements under Federal Rule of Civil Procedure 54(b) and, *third*, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Fourth and Seventh Circuits in this matter in *Flynn, supra, Smith, supra.*

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[21] The court of appeals cites earlier Case 1 for the propositions, by implication, that the affirmative defense of patent invalidity is a claim for purposes of Rule 54(b), jurisdiction under 28 USC 1338(a), and the 5th Amendment right to be heard on claims of a complaint. It also cites earlier Case 2 for the propositions, by implication, that the affirmative defenses of collateral estoppel and judicial immunity are claims for purposes of Rule 54(b), jurisdiction under 28 USC 1331 and 1343, and the 5th Amendment right to be heard on claims of a complaint.

2 The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that the affirmative defense of judicial immunity is a claim for purposes of jurisdiction under 28 USC 1338,1331,1343 in earlier Cases 1-4 and under 28 USC 1334 and 28 USC 157(b) (2)(B) and (C) in the instant cases[22]. This is contrary to the decisions of this Court and other Circuits. See citations in Part B *supra*. This Court should grant certiorari here, **first**, to resolve the conflict created by the court of appeal's decision and this Court's decision in *Christianson, supra* that affirmative defenses are not claims for purposes of jurisdiction under 28 USC 1338,1331,1343; this Court's decision in *Louisville & Nashville RR Co., supra* that "federal subject matter jurisdiction may not rest on defenses but must instead rest on affirmative claims of federal rights"; and this Court's decision in *United Public Works, supra* that "a defense which rests on something that may or may not happen in the future is not ripe", **second**, to explicitly rule that affirmative defenses of patent invalidity and judicial immunity are not claims for purposes of jurisdiction under 28 USC 1338,1331,1343,1334 and 28 USC 157(b) (2) (B) and (C) and under Article III Section 2.1 of the Constitution and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Third and Federal Circuits in the matter in *Thiokol Chemical, supra* and *Simmons Fastener, supra.*

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[22] See footnote 21.

3. The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that the affirmative defense of judicial immunity does not deprive petitioner's right to be heard on his claims in earlier cases and in the instant cases[23]. This is contrary to the decisions of this Court and other Circuits. See citations in Part C *supra*. This Court should grant certiorari here, **first**, to resolve the conflicts created by the court of appeal's decision and this Court's decisions in *Hanna, supra* and *Sibbach, supra* that "Where a conflict exists between a federal rule and substantive law the latter is unaffected by the rule, i.e., the rule is of no force and effect when rights involve substantive law, and jurisdiction"; this Court's decision in *Hodgson, supra* that "A procedural rule cannot extend federal court jurisdiction beyond the limits of the Constitution"; this Court's decision in *Windsor, supra* that a judgement is void when a court denies a hearing or opportunity to be heard; and this Court's decisions in *Roche, supra, U.S. Alkali, supra, Banker's Life, supra, Will, supra, Schlagenhauf, supra*, and *Gulfstream, supra* that the inferior courts must be held to a lawful exercise of their prescribed jurisdiction, **second**, to explicitly rule that affirmative defenses of patent invalidity and judicial immunity which deprive the right to be heard on claims of complaints offend due process and, **third**, to resolve the conflicts created by the Ninth Circuit's decision and decisions in the Third and Seventh Circuits in

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[23] See footnote 21.

United States v. Long, supra, and *Whitehurst, supra* that the exclusion of evidence is inconsistent with substantial justice to be heard and to offer evidence on claims of the complaint (causes of action).

4. The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that its decision does not require inquiry into the question of subject matter jurisdiction raised by petitioner in the instant case. This is contrary to the decisions of this Court and other Circuits. See numerous decisions in *Wright, Miller, Cooper Federal Practice and Procedure, Jurisdiction 2d* 3536 footnote 2. This Court should grant certiorari here to resolve the conflicts created by the court of appeal's decision and the numerous decisions in *Wright, Miller, Cooper Federal Practice and Procedure, Jurisdiction 2d* 3536 footnote 2.

5. The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that a judge is immune for actions, though judicial in nature, are taken in the complete absence of all jurisdiction[24]. This is contrary to the decision of this Court. See citation in Part E *supra*. This Court should grant certiorari here to resolve the conflict created by the court of appeal's decision and this Court's decision in *Mireles, supra* that "a judge is not immune for actions, though judicial in nature, are taken in the complete absence of all jurisdiction".

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[24] See footnote 16.

6. The court of appeals cites *Stump v. Sparkman* 435 US 349,356-357 (1978) for the proposition, by implication, that a judge is immune for violations of constitutional and civil rights. This is contrary to the decisions of this Court. See citations in Part F *supra*. This Court should grant certiorari here to resolve the conflicts created by the court of appeal's decision and this Court's decision in *Bolling, supra* that federal judges are bound by constitutional guarantees; this Court's decisions in *Briscoe, supra, Butts, supra*, and *Bell, supra* that judges are subject to criminal liability under 18 USC 242 for violations of constitutional rights of individuals; this Court's decision in *Hafer, supra* that judicial actions which violate the Constitutional rights of individuals may be sued as a cause of action in civil litigation against those performing said acts, without any form of immunity; and this Court's decisions in *Bivens, supra, Davis, supra*, and *Carlson, supra* that *Bivens*-type actions are available against federal judges under many constitutional provisions.

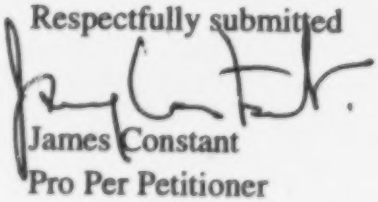
7. The court of appeals cites *Mullis v. United States Bankr.Ct.* (CA9 1987) 828 F2d 1385 for the proposition that declaratory and injunctive relief is not available against judges. This is contrary to the decision of the Seventh Circuit. See citation in Part G *supra*. This Court should grant certiorary here to resolve the conflict created by the Ninth Circuit's decision and the decision of the Seventh Circuit in the matter in *Scruggs, supra*.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the Memorandum opinion of the Court of Appeals in this matter[25].

Dated: March 4, 1994

Respectfully submitted



James Constant
Pro Per Petitioner

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[25] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinions and opinions in the Third, Fourth, Fifth, Seventh and Federal Circuits cited in Parts A through G *supra*.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT,	)	No.92-55891
	)	
Debtor,	)	D.C. No.
	)	CV-92-0409-RSWL
JAMES CONSTANT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STEPHEN V. WILSON, District Judge; MANUEL REAL, Chief District Judge; ROBERT P. AGUILAR; OSCAR DAVIS; WILSON COWEN, Judge; EDWARD SMITH; HELEN NIES; PAULINE NEWMAN; HOWARD MARKEY; PAUL MICHEL; UNITED STATES OF AMERICA,	)	
	)	
Defendants-Appellees.	)	
	)	

In re: JAMES CONSTANT,	)	No. 92-56045
	)	
Debtor,	)	D.C. No.
	)	CV-92-1394-RSWL
	)	
	)	
JAMES CONSTANT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STEPHEN V. WILSON,	)	
District Judge;	)	
MANUEL REAL,	)	
Chief District Judge;	)	
ROBERT P. AGUILAR;	)	
OSCAR DAVIS;	)	
WILSON COWEN, Judge;	)	
EDWARD SMITH;	)	
HELEN NIES;	)	
PAULINE NEWMAN;	)	
HOWARD MARKEY;	)	
PAUL MICHEL;	)	
UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendants-Appellees.	)	
	)	

JAMES CONSTANT,	)	No. 92-55995
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-92-2018-RSWL
v.	)	
STEPHEN V. WILSON, District Judge; MANUEL REAL, Chief District Judge; ROBERT P. AGUILAR; OSCAR DAVIS; WILSON COWEN, Judge; EDWARD SMITH; HELEN NIES; PAULINE NEWMAN; HOWARD MARKEY; PAUL MICHEL; UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the Central District of California Ronald S. W. Lew, District Judge, Presiding

Submitted November 17, 1993**

Before: SCHROEDER, D.W. NELSON, and THOMPSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

In these consolidated appeals, James Constant appeals pro se the district court's dismissal of three actions Constant filed against ten federal judges. Constant also appeals the district court's order enjoining him from filing further papers without prior court approval. We have jurisdiction pursuant to 28 U.S.C. 1291. We affirm.

The history of Constant's litigation is summarized in previous decisions of the Federal Circuit and in the orders of the district court, and we do not repeat it here. See *Constant v. United States*, 929 F.2d 654, 656 (Fed. Cir.), *cert. denied*, 111 S.Ct. 2799 (1991); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 488 U.S. 892 (1988). After Constant's numerous district court actions were decided adversely to him, and faced with numerous sanctions awards imposed by various U.S. district and appellate courts for his frivolous litigation, Constant filed for bankruptcy. *In re Constant*, Bk.No. LA-89-19270-KL (Bankr. C.D. Cal.).

Constant filed two of the instant complaints in bankruptcy Court as adversary proceedings. *Constant v. Wilson* (*In re Constant*), Adversary Nos. LA 91-07337-KL & 91-01414-KL. On defendants' motion, the reference of Constant's complaints to the Bankruptcy court was withdrawn and the complaints were transferred to district court. *Constant v. Wilson*, Nos. CV-91-0409 RSWL & CV-92-1394-RSWL. Constant filed the third action in district court. *Constant v. Wilson*, No. CV-91-2018-RSWL. All three actions were calendared before Judge Lew.

Constant named the same ten federal judges as defendants in all three actions. In essence, Constant alleged that the defendants had violated his constitutional rights by committing fraud, conspiracy, and judicial misconduct in deciding previous litigation regarding Constant's patent claims adversely to Constant. Constant sought damages and various forms of injunctive and declaratory relief. The district court dismissed all three actions on grounds of judicial immunity and, alternatively, res judicata. The district court also enjoined Constant from filing any further pleadings against these defendants without first obtaining court approval.

On appeal, Constant contends that the district court erred by (1) withdrawing the reference to bankruptcy court in Nos. CV-92-0409-RSWL and CV-92-1394-RSWL, (2) dismissing the actions, and (3) entering the injunction.

I. WITHDRAWAL OF REFERENCE

We review for abuse of discretion the district court's order granting defendants' motion to withdraw the reference to bankruptcy court. *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1451 (9th Cir. 1990). A district court may withdraw, in whole or in part, any case or proceeding referred to bankruptcy court, on its own motion or on timely motion by any party, for cause shown. 28 U.S.C. 157(d). The factors to be considered in determining whether to withdraw the reference include whether the proceeding is a core

proceeding, judicial economy, convenience, and expertise of the court. *United States v. Star Route Box 1328*, 137 B.R. 802, 806 (Bankr. D. Or. 1992).

Here, Constant's complaints challenged the decisions and rulings issued by defendants in Constant's previous litigation. These actions are clearly non-core proceedings. See *Robertson. v. Isomedix, Inc.* (*In re INTL Nutronics, Inc.*), 3 F.3d 306, 310 (9th Cir. 1993). Further, because the district court was already familiar with the issues and facts involved in Constant's complaints, considerations of judicial economy supported withdrawal of the bankruptcy reference and transfer of these actions to district court. Under these circumstances, the district court did not abuse its discretion by withdrawing the reference. See *In re Cinematronics, Inc.*, 916 F.2d at 1451; *Star Route Box 1318*, 137 B.R. at 806.

II. DISMISSAL OF COMPLAINT

We review de novo the district court's dismissal of an action for failure to state a claim. *Kruso v. International Tel. & Tel. Corp.*, 871 F.2d 1416, 1411 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). Judges are absolutely immune from civil suits for damages for judicial acts taken within their judicial capacity. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). Judicial immunity applies to actions taken in error, maliciously, or in excess of authority. *Id.* Judges lose their immunity only when they act in the absence of all jurisdiction or perform acts

which are not judicial in nature. *Id.*

In 42 U.S.C. 1983 actions, judicial immunity does not bar actions seeking prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 511, 541-42 (1984). Nevertheless, this rule does not apply to constitutional tort actions brought against federal defendants pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *Mullis v. United States Bankruptcy Court, District of Nevada*, 818 F.2d 1385, 1394 (1987), appeal dismissed, *cert. denied*, 486 U.S. 1040 (1988). Thus, judicial immunity bars actions for declaratory, injunctive and other equitable relief against federal officers. *Id.*

Here, Constant named the same ten federal judges in all three actions. Constant alleged that the judges had violated his constitutional rights by deciding his previous actions without jurisdiction. Constant also alleged that the judges committed fraud, conspiracy, and judicial misconduct in deciding his actions. Constant sought damages and injunctive and declaratory relief, including declarations that the previous judgements are void, declarations that various statutes and rules are unconstitutional, and disbarment of the defendants.

Because the allegations in Constant's complaint concern actions taken by the judges in their judicial capacity, Constant's claims are barred by judicial immunity. *See Stump*, 435 U.S. at 356-57 (claims for damages); *Mullis*, 828 F.2d at 1394 (claims for declaratory and injunctive relief). Further, Constant's conclusory allegations that the defendants were acting in excess of all jurisdiction were not sufficient to defeat immunity

because Constant failed to allege any facts to support these allegations. Thus, the district court correctly dismissed Constant's actions as barred by judicial immunity.[1/]

III. PRE-FILING ORDER

We review the district court's order enjoining the filing of meritless claims for abuse of discretion. *Moy v. United States*, 906 F.2d 467, 469 (9th Cir. 1990). An injunction restricting access to the courts is an extraordinary remedy which should be narrowly tailored and rarely used. *Id.* at 470. We have outlined specific requirements which district courts must follow before issuing a pre-filing order. *De Long v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir.), *cert. denied*, 498 U.S. 1001 (1990). Specifically, (1) the plaintiff must be given notice and the opportunity to oppose the order, (2) there must be an adequate record for review, (3) the court must make substantive findings of frivolousness, and (4) the order must be narrowly tailored to curb the abuses of this particular litigant. *Id.*

1/ Because we affirm the district court's decisions on the grounds of judicial immunity, we do not address the district court's alternative grounds for dismissal on the basis of res judicata.

Constant also contends that the district court erred by granting defendants' motion to substitute the United States for defendants pursuant to 28 U.S.C. 2679 as to Constant's common law tort claims. Because we conclude that the district court correctly dismissed all of Constant's claims as barred by judicial immunity, we need not address this issue.

The record demonstrates that all the *De Long* requirements were met in this case. Constant was given notice of the defendants' motion for injunction, filed extensive opposition papers, and appeared at the hearing on the motion for injunction. The district court made specific findings of frivolousness, and these findings are fully supported by the record in this case and by Constant's history of litigiousness. The injunction was sufficiently narrow in that it limited Constant from filing further papers against these defendants based on facts or claims raised in his previous litigation, but did not prohibit Constant from access to the courts in unrelated matters. Under these circumstances, we conclude that the injunction was appropriate to stop Constant's meritless litigation. *See Id.*

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re JAMES CONSTANT,	)	Case No.
	)	CV 92-0409-RSWL
Debtor,	)	
	)	Bk. Case No.
	)	LA 89-19270 KL
	)	[Chapter 7]
	)	
JAMES CONSTANT,	)	Adversary No.
	)	LA 91-07337 KL
Plaintiff,	)	REFERRED TO U.S
	)	DISTRICT JUDGE
	)	RONALD S.W. LEW
vs.	)	
	)	ORDER
STEPHEN WILSON, et al.,	)	
	)	
Defendants.	)	
	)	

Defendants in the above captioned action have moved for an order dismissing Plaintiff's Complaint for failure to state a claim upon which relief may be granted, Pursuant to Fed. R. Civ. P. 12(b)(6)[1]. Plaintiff timely opposed the motion and Defendants filed a reply. The matter was set for oral argument on May 11, 1992, at 9:00 a.m., but was removed from the Court's law and motion calendar for disposition based on the filed pa-

[1] In their Notice of Motion, Defendants also cite Rule 12(b)(1) as grounds for dismissal. However, since Defendants failed to brief this issue, the Court will consider only Rule 12(b)(6).

pers pursuant to Fed. R. Civ. P. 78. Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby issues the following order:

Defendants' Motion to Dismiss is GRANTED, and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

BACKGROUND

A. PLAINTIFF'S HISTORY OF LITIGATION

This action is one of the latest in a series of ten lawsuits filed by Plaintiff James Constant, all related to an original patent claim. In 1985, Mr. Constant brought suit in the Central District of California against twenty companies for patent infringement. Defendant Judge Wilson granted summary judgment in favor of defendants in that action, finding Constant's alleged patents invalid and his constitutional challenges to 35 U.S.C. 282 without merit. *Constant v. Advanced Micro Devices, Inc.* Case No. CV 85-0262-SVW (hereinafter "First Patent Case") Judge Wilson's decision was upheld on appeal, and certiorari was denied by the Supreme Court. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S.Ct. 228 (1988).

In 1987, while the appeal of the First Patent Case was still pending, Constant filed four new actions in the Central District of California against Judge Wilson, Special Master Robert E. Hillman, and several defendants from the First Patent Case. *Constant v. Hillman*, Case No. CV 87-6592-R;

Constant v. Hoff, Case No. CV 87 6766-R; *Constant v. Hitachi America Ltd.*, Case No. CV 87-7046 R; and *Constant v Wilson*, Case No. CV 87-7315-R. In these cases, Constant alleged that he had been deprived of his patent rights and right to a jury trial in the First Patent Case by fraudulent behavior. Chief Judge Manuel R. Real dismissed all four cases with prejudice, and the Federal Circuit affirmed all four decisions in a consolidated decision. *Constant v. Wilson*, 856 F.2d 202 (Fed Cir. 1988), *cert. denied*, 110 S.Ct. 330 (1989).

In 1988, Constant filed a patent infringement action in the Central District based on a patent that had not been at issue in the First Patent Case. *Constant v. Advanced Micro-Devices, Inc.*, Case No. CV 88-0784-SVW (hereinafter "Second Patent Case"). The Second Patent Case, which was randomly assigned to Judge Wilson, named eight companies as defendants, six of which had been named in the First Patent Case. Judge Wilson dismissed the case with prejudice, and the Federal Circuit affirmed. The Supreme Court denied certiorari. *Constant v. Advanced Micro-Devices Inc.*, 873 F.2d 1451 (Fed. Cir.), *cert. denied*, 110 S.Ct. 62 (1989).

Also in 1988, Advanced Micro-Devices, Inc. brought a declaratory relief action against Mr. Constant in the Northern District of California, seeking a declaration that his three patents were invalid. *Advanced Micro-Devices Inc. v. Constant*, Case No. 88-20101 RPA (N.D. Cal.) (hereinafter the "Northern District Case"). Defendant Judge Aguilar granted summary judgment in favor of Advanced Micro–Devices and dismissed Constant's counterclaims. The Federal Circuit

affirmed the judgement, and certiorari was denied. *Advanced Micro-Devices Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 868 (1990).

In 1989, Plaintiff filed for bankruptcy in the United States Bankruptcy Court for the Central District of California. *In re James Constant*, Case No. LA 89-19270-KL. In 1991, Plaintiff filed another suit as an adversary proceeding in his bankruptcy, alleging fraud by 43 defendants in the disposition of his prior lawsuits. *In re James Constant (Constant v. Advanced Micro-Devices, Inc.)*,, Bankruptcy Adversary Case No. 91-06283-KL (Bankr. C.D. Cal.). The District Court withdrew the bankruptcy reference, and the case was designated as Case No. CV 91-5456-R. The case was subsequently dismissed with prejudice by Defendant Judge Real. Judge Real also issued an order prohibiting Plaintiff from filing new, related lawsuits against any of the 43 defendants without first obtaining Court approval.

Plaintiff filed the instant action in 1992, as well as two other lawsuits against the Defendant judges. One was filed directly in District Court. *Constant v. Wilson*, Case No. CV 92-2018-HLH (Tx). The other was filed in Bankruptcy Court; its reference was subsequently withdrawn to this Court. *In re James Constant (Constant v. Wilson)*, Case No. CV 92-1394-RSWL.

B. THE INSTANT CASE

In his Complaint, Mr. Constant reasserts past grievances about the disposition of his numerous lawsuits, naming the three district judges and the seven circuit judges involved with those cases as Defendants. The first six Counts of the Complaint allege that the seven cases which have been decided against Plaintiff are void because the courts lacked jurisdiction. In Count VII, Plaintiff alleges that the Defendant judges violated his due process rights when they dismissed or summarily judged the cases. Counts VIII-XIV allege fraud in the disposition of the seven cases. Count XV states a claim for judicial misconduct, and Count XVI alleges various damages.

DISCUSSI0N

I. STANDARD

In motions to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed only if it presents no justiciable facts. Normally, a plaintiff's allegations of fact must be accepted as true for the purposes of the motion. This is especially true for claims brought by pro per litigants in constitutional cases. *Mullins v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987). At the same time, mere conclusory allegations need not be taken at face value. "We do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 12(a). Denial of leave to amend is an exceptional measure, even when the plaintiff has not requested leave. However, leave may be denied "when the court determines that other facts consistent with the pleadings could not possibly cure the deficiency." *Schreiber Distributinq v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) "[I]f a complaint is dismissed for failure to state a claim upon which relief may be granted, leave to amend may be denied even if prior to a responsive pleading, if amendment of the complaint would be futile." *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988).

II. JUDICIAL IMMUNITY

Plaintiff's claims are barred by the doctrine of judicial immunity, which protects judges from being sued for actions taken in the exercise of their judicial authority. The doctrine of judicial immunity can be overcome only in two discrete situations: first, when an action is nonjudicial, that is, not taken in the judge's judicial capacity; and second, when a judge acts in the complete absence of all jurisdiction. *Mireles v. Waco*, 112 S.Ct. 286, 288 (1991).

Therefore, Plaintiff's repeated but unspecified allegations of fraud do not negate the defense of judicial immunity. "[I]mmunity applies even when the judge is accused of acting maliciously and corruptly." *Pierson v. Ray*, 87 S.Ct. 1213, 1218 (1967). Furthermore, the parties agree that the acts complained of were taken within Defendants' judicial capacity.

However, Plaintiff also seeks to defeat judicial immunity by asserting lack of jurisdiction and inapplicability of immunity to injunctive relief.

A. JURISDICTION

Plaintiff's Complaint repeatedly alleges that the Defendant judges "acted in the clear absence of all jurisdiction." Complaint at par. 157. However, merely alleging complete lack of Jurisdiction will not suffice to defeat immunity; Plaintiff has not alleged any facts that demonstrate a complete lack of jurisdiction, nor could he.[2]

Plaintiff's claim that Defendants acted in the absence of subject matter jurisdiction is primarily based on a fundamental misunderstanding of federal civil procedure. Mr. Constant apparently believes that defendants must establish an independent cause of action, and independent jurisdiction, to properly file a summary judgment or dismissal motion. He concludes that any judge who disposes of a case through a pretrial motion does so in the complete absence of jurisdiction because the "merits" of the claim have not been reached.[3] Mr. Constant is simply wrong.

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[2] "Jurisdiction is construed broadly when the issue is the immunity of a judge." *Crooks v. Maynard*, 923 F.2d 699, 700 (9th Cir. 1990). Only colorable jurisdiction is required to establish immunity. Id. at 701

[3] For example, in one of the clearer examples of this logic, Mr. Constant states: "Creditor's judgements ... cover issues of defense not claims". Section 1338 jurisdiction is over claims not issues". Complaint at par. 14. See also pars 16,25,37,38.

Furthermore, in Count V Plaintiff claims that the United States District Court for the Central District of California lacked personal jurisdiction over his adversaries in his previous patent cases. Even if Plaintiff could assert jurisdictional defects on behalf of his victorious adversaries in a previous action, he waived any objections to jurisdiction when he filed that case.

Finally, in Count VI Plaintiff asserts that the court in the Northern District Case lacked personal jurisdiction over him because the Northern District was an improper venue. This claim is meritless: it confuses venue with personal jurisdiction, and attempts to relitigate a venue objection that was previously adjudicated and upheld on appeal. See *Advanced Micro-Devices Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 868 (1990).

Since Plaintiff's jurisdictional arguments are meritless, and since the parties agree that Defendants were acting in their judicial capacity at all relevant times, Plaintiff cannot overcome judicial immunity under either of the two exceptions enumerated in *Mireles*.

B. INJUNCTIVE RELIEF

Plaintiff's Complaint demands various forms of injunctive relief, including "purging recreant officers from the tribunals on whom the fraud was practiced," "recession [sic]" of all the Defendants' orders, disqualification of Defendants from any action involving Plaintiff, and various declarations of wrongdoing by Defendants. See pars.168, 170, 173, 176, 177, 178, and 179 of the Complaint. Plaintiff argues that the doc-

trine of judicial immunity cannot bar an injunctive relief action against judges acting in their official capacity. Plaintiff cites *Pulliam v. Allen*, 104 S.Ct. 1970 (1984), which established that judicial immunity will not insulate a defendant from injunctive or declaratory relief in a Section 1983 action.

Plaintiff's argument ignores precedent. The Ninth Circuit has limited *Pulliam* to Section 1983 actions, which apply only to the acts of state officials. In Bivens-type actions against officials acting under color of federal law, the Ninth Circuit has held that the scope of immunity to injunctive relief is concurrent with the scope of immunity to damages.[4] In *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987), the court affirmed the dismissal of a claim for injunctive relief against a bankruptcy judge:

The reasoning of *Pulliam* simply is inapplicable to a *Bivens* action. There is no need to carve out an exception to judicial immunity to permit declaratory or injunctive relief against federal judicial officers. Should a federal judge or other federal official performing a judicial or quasi-judicial act violate a litigant's constitutional rights in a proceeding pending in federal court, Congress has provided carefully structured procedures for taking appeals, including interlocutory appeals . . . . To allow an action for declaratory and injunctive relief against federal officials who would be entitled to judicial im-

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[4] A *Bivens* action is a claim alleging direct constitutional torts against persons acting under the color of federal law. *Bivens v. Six Unknown Named Agents*, 91 S.Ct. 1999 (1971).

munity from damages merely engenders unnecessary confusion and a multiplicity of litigation. *Id.* at 1394.

Since Constant's Complaint is a Bivens-style claim of violation of constitutional rights under color of federal law, his demands for injunctive relief do not pierce Defendants' judicial immunity. The potential for abuse that concerned the Mullins court has been vividly demonstrated in the instant case by Plaintiff's continuing attempts to collaterally attack past adverse judgments.[5]

There is nothing consistent with the Complaint that Plaintiff could assert which would defeat the defense of judi-

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[5] *Mullins* has not been universally followed in other circuits. For instance, in *Scruqqs v. Moellering*, 870 F.2d 376 (7th Cir 1989), Judge Posner questioned the need to forge an exception to *Pulliam* for *Bivens* actions. Judge Posner found that: "The limitations already imposed by the requirements for obtaining equitable relief against any defendant -- a showing of inadequate remedy at law and of a serious risk of irreparable harm . . . severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants." *Scruggs, supra* at 378 (quoting *Pulliam, supra* at 1978).

However, the Ninth Circuit's clear, contrary rule in *Mullins* makes it unnecessary for this Court to reach the requirements of equitable relief in the instant case. But even if this Court had reached the requirements, Plaintiff's Complaint would have failed to meet them. "Where a federal officer meets the prerequisites for judicial or quasi-judicial immunity from damages, there will invariably be an adequate remedy through either ordinary appeals or by extraordinary writ . . . . Indeed, a quick perusal of the voluminous entries on the docket of the underlying bankruptcy case reveals that *Mullins* made more than ample use of the available procedures for appeal and mandamus." *Mullins*, 818 F.2d at 1392. Mr. Constant has consistently taken advantage of the entirely adequate legal remedies available to him, including four appeals to the Court of Appeals for the Federal circuit and four applications for certiorari to the Supreme Court.

cial immunity. Therefore, the Complaint is DISMISSED WITH PREJUDICE.

III. ALTERNATIVE GROUNDS FOR DISMISSAL WITH PREJUDICE

Defendants' entitlement to judicial immunity against all of Plaintiff's claims is dispositive of this entire case. However, based on Plaintiff's persistence in attempting to collaterally attack past judgements, it is prudent to comment on other grounds barring his recovery.

A. PLAINTIFF'S CONSTITUTIONAL RIGHTS HAVE NOT BEEN VIOLATED

Plaintiff's claim that his constitutional rights were violated stems from his central premise that Defendants did not adjudicate the merits of his claims when they dismissed and/or summarily judged the previous cases. This argument is without merit. It is well established that proper dismissals or grants of summary judgement do not infringe upon a litigant's Seventh Amendment or due process rights. There is no right to a jury trial in the absence of justiciable facts. *Ex Parte Peterson*, 40 S.Ct. 543 (1920). Dismissals and summary judgments were properly granted in Plaintiff's past actions. These decisions were affirmed on appeal, and cannot be collaterally attacked now. Therefore, even assuming arguendo that Plaintiff could sue Defendant United States based on acts for which the Defendant judges are immune, the claims against the United States are still properly dismissed for failure to state a claim upon which relief may be granted.

B. FRAUD

In Counts VIII-XIV of his Complaint, Plaintiff reasserts his constitutional arguments in the guise of a fraud claim, alleging that he was fraudulently deprived of his right to a jury trial and his right to have the "merits" of his cases adjudicated. However, merely attaching the label "fraud" does not transform these meritless constitutional arguments into claims upon which relief may be granted.

C. RES JUDICATA

Had the defense of judicial immunity failed, Plaintiff would nevertheless have been estopped under the doctrine of res judicata from collaterally attacking past judgments by reasserting claims and issues that have already been adjudicated. See Restatement (Second) of Judgement 13 (1982). Constant's allegations of fraudulent judgement by the Defendant judges are poorly masked attempts to revisit and reverse his past defeats. "Even though an action has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgement." *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972). Notwithstanding Plaintiff's contentions to the contrary, defensive issue preclusion is appropriate even on behalf of those Defendants who were not parties in Plaintiff's previous actions. *Blonder-Tongue Laboratories v. Univ. of Illinois Foundation*, 91 S. Ct. 1434 (1971).

IT IS SO ORDERED.

DATED: June 19, 1992

RONALD S.W. LEW
United States District Judge

CV-92-0409-RSWL, *In re James Constant*, Defendants' Motion to Dismiss.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re JAMES CONSTANT,	)	Case No. CV 92-1394-RSWL
Debtor,	)	Bk. Case No. LA 89-19270 KL [Chapter 7]
JAMES CONSTANT,	)	Adversary No. LA 92-01414 KL
Plaintiff,	)	REFERRED TO U.S. DISTRICT JUDGE RONALD S.W. LEW
vs.	)	
STEPHEN WILSON, et al.,	)	ORDER
Defendants.	)	

Defendants in the above captioned action have moved for an order dismissing Plaintiff's Complaint for failure to state a claim upon which relief may be granted, Pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff timely opposed the motion. The matter was set for oral argument on July 27, 1992, at 9:00 a.m., but was removed from the Court's law and motion calendar for disposition based on the filed papers pursuant to Fed. R. Civ. P. 78. Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby

issues the following order:

Defendants' Motion to Dismiss is GRANTED, and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

I. BACKGROUND

This action is one in a series of eleven lawsuits, including three in this Court, filed by Plaintiff James Constant. All eleven relate to an original patent claim. Constant's litigious history was first set out in detail in this Court's Order dismissing the Complaint in *In Re James Constant (Constant v. Wilson et.al.)*, CV-92-0409-RSWL, entered June 22, 1992.

A. CONSTANT'S HISTORY OF LITIGATION

In 1985, Mr. Constant brought suit in the Central District of California against twenty companies for patent infringement. Defendant Judge Wilson granted summary judgment in favor of defendants in that action, finding Constant's alleged patents invalid and his constitutional challenges to 35 U.S.C. 282 without merit. *Constant v. Advanced Micro*-Devices, Inc. Case No. CV 85-0262-SVW (hereinafter "First Patent Case"). Judge Wilson's decision was upheld on appeal, and certiorari was denied by the Supreme Court. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S.Ct. 228 (1988).

In 1987, while the appeal of the First Patent Case was still pending, Constant filed four new actions in the Central District of California against Judge Wilson, Special Master

Robert E. Hillman, and several defendants from the First Patent Case. *Constant v. Hillman*, Case No. CV 87-6592-R; *Constant v. Hoff*, Case No. CV 87 6766-R; *Constant v. Hitachi America Ltd.*, Case No. CV 87-7046 R; and *Constant v Wilson*, Case No. CV 87-7315-R. In these cases, Constant alleged that he had been deprived of his patent rights and right to a jury trial in the First Patent Case by fraudulent behavior. Chief Judge Manuel R. Real dismissed all four cases with prejudice, and the Federal Circuit affirmed all four decisions in a consolidated decision. *Constant v. Wilson*, 856 F.2d 202 (Fed Cir. 1988), *cert. denied*, 110 S.Ct. 330 (1989).

In 1988, Constant filed a patent infringement action in the Central District based on a patent that had not been at issue in the First Patent Case. *Constant v. Advanced Micro-Devices, Inc.*, Case No. CV 88-0784-SVW (hereinafter "Second Patent Case"). The Second Patent Case, which was randomly assigned to Judge Wilson, named eight companies as defendants, six of which had been named in the First Patent Case. Judge Wilson dismissed the case with prejudice, and the Federal Circuit affirmed. The Supreme Court denied certiorari. *Constant v. Advanced Micro-Devices, Inc.*, 873 F.2d 1451 (Fed. Cir.), *cert. denied*, 110 S.Ct. 62 (1989).

Also in 1988, Advanced Micro-Devices, Inc. brought a declaratory relief action against Mr. Constant in the Northern District of California, seeking a declaration that his three patents were invalid. *Advanced Micro-Devices Inc. v. Constant*, Case No. 88-20101 RPA (N.D. Cal.) (hereinafter the "Northern District Case"). Defendant Judge Aguilar granted

summary judgment in favor of Advanced Micro–Devices and dismissed Constant's counterclaims. The Federal Circuit affirmed the judgement, and certiorari was denied. *Advanced Micro-Devices Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 868 (1990).

In 1989, Plaintiff filed for bankruptcy in the United States Bankruptcy Court for the Central District of California. *In re James Constant*, Case No. LA 89-19270-KL. In 1991, Plaintiff filed another suit as an adversary proceeding in his bankruptcy, alleging fraud by 43 defendants in the disposition of his prior lawsuits. *In re James Constant (Constant v. Advanced Micro-Devices, Inc.)*,, Bankruptcy Adversary Case No. 91-06283-KL (Bankr. C.D. Cal.). The District Court withdrew the bankruptcy reference, and the case was designated as Case No. CV 91-5456-R. The case was subsequently dismissed with prejudice by Defendant Judge Real. Judge Real also issued an order prohibiting Plaintiff from filing new, related lawsuits against any of the 43 defendants without first obtaining Court approval.

In 1992, Constant filed another adversary proceeding in bankruptcy court against the ten District and Circuit Court judges (the Defendants in the instant case) who had adjudicated his previous cases. The bankruptcy reference was withdrawn, and the case was filed in this Court. *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. Constant alleged violation of due process rights, judicial misconduct, lack of jurisdiction, and various other claims. This Court dismissed the Com-

plaint with prejudice.

During the pendency of *In re Constant (Constant v. Wilson)*, CV-91-0409-RSWL, Constant brought another case in this Court against the same ten judicial defendants. *Constant v. Wilson*, CV-92-1018-RSWL. In this case, Constant alleged that the judgments in his earlier cases were the result of fraud and violation of his constitutional rights. The case is pending.

B. THE INSTANT CASE

In the instant case, Constant reasserts his claims against the same ten judicial Defendants from *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. The ten counts in the Complaint rephrase his arguments from that case and his previous cases in the form of a demand for declaratory judgement. In substance, Constant seeks a declaration that Federal Rules of Civil Procedure 11, 12(b), 41(b), and 56 are unconstitutional; that the Rules Enabling Act, 28 U.S.C. 2072, and the Judicial Conference statute, 28 U.S.C. 331, are unconstitutional; that the judicial case assignment statute, 28 U.S.C. 137, is unconstitutional; and that all of the judgments against him under these rules and statutes violated his rights to due process, litigation, and jury trial. Constant also seeks damages and a variety of forms of injunctive relief, including the disbarment of the Defendants.

Defendants now move to dismiss, Pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be given. Mr. Constant opposes the motion.

II. DISCUSSION

A. STANDARD

In motions to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed only if it presents no justiciable facts. Normally, a plaintiff's allegations of fact must be accepted as true for the purposes of the motion. This is especially true for claims brought by pro per litigants in constitutional cases. *Mullins v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987). At the same time, mere conclusory allegations need not be taken at face value. "We do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 12(a). Denial of leave to amend is an exceptional measure, even when the plaintiff has not requested leave. However, leave may be denied "when the court determines that other facts consistent with the pleadings could not possibly cure the deficiency." *Schreiber Distributing v Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) "[I]f a complaint is dismissed for failure to state a claim upon which relief may be granted, leave to amend may be denied even if prior to a responsive pleading, if amendment of the complaint would be futile." *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988).

B. JUDICIAL IMMUNITY

Constant's claims against the Defendants are barred by the doctrine of judicial immunity, which protects judges from being sued for actions taken in the exercise of their judicial authority. The analysis here is identical to that in *In Re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, and thus a brief recapitulation of the subject is sufficient for the purposes of this order.

The doctrine of judicial immunity can be overcome only in two discrete situations: first, when an action is nonjudicial, that is, not taken in the judge's judicial capacity; and second, when a judge acts in the complete absence of all jurisdiction. *Mireles v. Waco*, 111 S.Ct. 186, 188 (1991). Constant's repeated but unspecified allegations of fraud and conspiracy do not pierce this defense.

Constant has repeatedly attempted to overcome judicial immunity by alleging that the Defendants acted in the complete absence of all jurisdiction. However, he has not alleged any facts that demonstrate a complete lack of jurisdiction, nor could he. Constant's allegations are based on the theory that a defendant must establish an independent cause of action, and independent jurisdiction, to properly file a summary judgement or dismissal motion. He concludes that any judge who disposes of a case through a pretrial motion does so in the complete absence of jurisdiction because the "merits" of the claim have not been reached. Mr. Constant is simply wrong.

Constant's Complaint also demands declaratory judgement and various forms of injunctive relief. He argues that the doctrine of judicial immunity cannot bar declaratory or injunctive relief actions against judges acting in their official capacity, citing *Pulliam v. Allen*, 104 S.Ct. 1970 (1984). However, as noted in *In Re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, *Pulliam* applies only to Section 1983 cases not to *Bivens* type cases. *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987).

Constant has not stated facts which could pierce the defense of judicial immunity, nor could he do so consistently with this Complaint. Therefore, the Complaint is DISMISSED WITH PREJUDICE.

C. RES JUDICATA

Had the defense of judicial immunity failed, Constant would nevertheless have been estopped under the doctrine of res judicata from collaterally attacking past judgements by reasserting claims and issues that have already been adjudicated. See Restatement (Second) of Judgement 13 (1982). Like the claims discussed in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, Constant's allegations here are poorly masked attempts to revisit and reverse his past defeats. "Even though an action has an independent purpose and contemplates some other relief it is a collateral attack if it must in some fashion overrule a previous judgement." *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972). (The preclusive effects of Constant's earlier lawsuits are dis-

cussed in greater detail in *In Re Constant (Constant v. Wilson)*, CV-92-0409-RSWL.)

Now, in addition to being estopped by his previous cases against other defendants, Constant is estopped by this Court's dismissal with prejudice of his claims against these ten Defendants in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. Claim preclusion bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the parties. . . ." *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986). Since Mr. Constant could have brought these claims against the Defendants in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, he is estopped from asserting them now. Constant's objections to res judicata in this case are identical to those already rejected by this Court. Therefore, this Complaint is barred by res judicata.

D. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In addition to being invalid for the reasons discussed above, each of the "Counts" of the Complaint fails to state any claims upon which relief may be granted. Constant's claims continue to spring from his convoluted interpretation of federal civil procedure and the Constitution. The heart of all of his arguments is the idea that his rights have been violated when his invalid claims are dismissed or summarily judged before trial. Like the claims discussed in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, these claims are bizarre and inaccurate, and warrant dismissal. See *Ex Parte Peterson*, 40 S.Ct. 543 (1920).

III. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss is GRANTED, and the Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: July 30, 1992

RONALD S.W. LEW
United States District Judge

CV-92-1394-RSWL, *In Re James Constant (Constant v. Wilson)*, Defendant's Motion to Dismiss.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES CONSTANT,	)	Case No.
	)	CV 92-2018-RSWL
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
STEPHEN WILSON, et al.,	)	
	)	
Defendants.	)	
	)	

Defendants in the above captioned action have moved for an order dismissing Plaintiff's Complaint for failure to state a claim upon which relief may be granted, Pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff timely opposed the motion and Defendants filed a reply. The matter was set for oral argument on July 27, 1992, at 9:00 a.m., but was removed from the Court's law and motion calendar for disposition based on the filed papers pursuant to Fed. R. Civ. P. 78. Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby issues the following order:

Defendants' Motion to Dismiss is GRANTED, and Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

I. BACKGROUND

This action is the latest in a series of eleven lawsuits, including three in this Court, filed by Plaintiff James Constant ("Constant"). All eleven relate to an original patent claim. Constant's litigious history was first set out in detail in this Court's Order dismissing the Complaint in *In Re James Constant (Constant v. Wilson et.al.)*, CV-92-0409-RSWL, entered June 22, 1992.

A. CONSTANT'S HISTORY OF LITIGATION

In 1985, Mr. Constant brought suit in the Central District of California against twenty companies for patent infringement. Defendant Judge Wilson granted summary judgment in favor of defendants in that action, finding Constant's alleged patents invalid and his constitutional challenges to 35 U.S.C. 282 without merit. *Constant v. Advanced Micro Devices, Inc.* Case No. CV 85-0262-SVW (hereinafter "First Patent Case") Judge Wilson's decision was upheld on appeal, and certiorari was denied by the Supreme Court. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir.), *cert. denied*, 109 S.Ct. 228 (1988).

In 1987, while the appeal of the First Patent Case was still pending, Constant filed four new actions in the Central District of California against Judge Wilson, Special Master Robert E. Hillman, and several defendants from the First Patent Case. *Constant v. Hillman*, Case No. CV 87-6592-R;

Constant v. Hoff, Case No. CV 87 6766-R; *Constant v. Hitachi America Ltd.*, Case No. CV 87-7046 R; and *Constant v Wilson*, Case No. CV 87-7315-R. In these cases, Constant alleged that he had been deprived of his patent rights and right to a jury trial in the First Patent Case by fraudulent behavior. Chief Judge Manuel R. Real dismissed all four cases with prejudice, and the Federal Circuit affirmed all four decisions in a consolidated decision. *Constant v. Wilson*, 856 F.2d 202 (Fed Cir. 1988), *cert. denied*, 110 S.Ct. 330 (1989).

In 1988, Constant filed a patent infringement action in the Central District based on a patent that had not been at issue in the First Patent Case. *Constant v. Advanced Micro-Devices, Inc.*, Case No. CV 88-0784-SVW (hereinafter "Second Patent Case"). The Second Patent Case, which was randomly assigned to Judge Wilson, named eight companies as defendants, six of which had been named in the First Patent Case. Judge Wilson dismissed the case with prejudice, and the Federal Circuit affirmed. The Supreme Court denied certiorari. *Constant v. Advanced Micro-Devices Inc.*, 873 F.2d 1451 (Fed. Cir.), *cert. denied*, 110 S.Ct. 62 (1989).

Also in 1988, Advanced Micro-Devices, Inc. brought a declaratory relief action against Mr. Constant in the Northern District of California, seeking a declaration that his three patents were invalid. *Advanced Micro-Devices Inc. v. Constant*, Case No. 88-20101 RPA (N.D. Cal.) (hereinafter the "Northern District Case"). Defendant Judge Aguilar granted summary judgment in favor of Advanced Micro–Devices

and dismissed Constant's counterclaims. The Federal Circuit affirmed the judgement, and certiorari was denied. *Advanced Micro-Devices Inc. v. Constant*, 889 F.2d 1099 (Fed. Cir. 1989), *cert. denied*, 110 S.Ct. 868 (1990).

In 1989, Plaintiff filed for bankruptcy in the United States Bankruptcy Court for the Central District of California. *In re James Constant*, Case No. LA 89-19270-KL. In 1991, Plaintiff filed another suit as an adversary proceeding in his bankruptcy, alleging fraud by 43 defendants in the disposition of his prior lawsuits. *In re James Constant (Constant v. Advanced Micro-Devices, Inc.)*, Bankruptcy Adversary Case No. 91-06283-KL (Bankr. C.D. Cal.). The District Court withdrew the bankruptcy reference, and the case was designated as Case No. CV 91-5456-R. The case was subsequently dismissed with prejudice by Defendant Judge Real. Judge Real also issued an order prohibiting Plaintiff from filing new, related lawsuits against any of the 43 defendants without first obtaining Court approval.

In 1992, Constant filed another adversary proceeding in bankruptcy court against the ten District and Circuit Court judges (the Defendants in the instant case) who had adjudicated his previous cases. The bankruptcy reference was withdrawn, and the case was filed in this Court. *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. Constant alleged violation of due process rights, judicial misconduct, lack of jurisdiction, and various other claims. This Court dismissed the Complaint with prejudice.

During the pendency of *In re Constant (Constant v. Wilson)*, CV-91-0409-RSWL, Constant brought another case in this Court against the same ten judicial defendants. *Constant v. Wilson*, CV-92-1394-RSWL. The case, filed against the same judicial defendants, seeks a declaration that various statutes and the Federal Rules of Civil Procedure are unconstitutional. The case is pending.

B. THE INSTANT CASE

In the instant case, Constant reasserts his claims against the same ten judicial Defendants from *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. The twenty counts in the Complaint are rephrasings of his arguments from that case and his previous cases. In substance, Constant claims that the judgements against him were obtained by fraud and conspiracy; that the Defendants usurped power and jurisdiction to rule against him without reaching the "merits" of his claim; that they infringed his due process rights, right to a jury trial, privileges and immunities, and right of freedom from unreasonable search and seizure; and that the judgments against him are void. Constant seeks damages and a variety of forms of injunctive relief, including the disbarment of the Defendants.

Defendants now move to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be given. Constant opposes the motion.

II. DISCUSSION

A. STANDARD

In motions to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed only if it presents no justiciable facts. Normally, a plaintiff's allegations of fact must be accepted as true for the purposes of the motion. This is especially true for claims brought by pro per litigants in constitutional cases. *Mullins v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987). At the same time, mere conclusory allegations need not be taken at face value. "We do not, however, necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 12(a). Denial of leave to amend is an exceptional measure, even when the plaintiff has not requested leave. However, leave may be denied "when the court determines that other facts consistent with the pleadings could not possibly cure the deficiency." *Schreiber Distributing v Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) "[I]f a complaint is dismissed for failure to state a claim upon which relief may be granted, leave to amend may be denied even if prior to a responsive pleading, if amendment of the complaint would be futile." *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988).

B. JUDICIAL IMMUNITY

Constant's claims against the Defendants are barred by the doctrine of judicial immunity, which protects judges from being sued for actions taken in the exercise of their judicial authority. The analysis here is identical to that in *In Re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, and thus a brief recapitulation of the subject is sufficient for the purposes of this order.

The doctrine of judicial immunity can be overcome only in two discrete situations: first, when an action is nonjudicial, that is, not taken in the judge's judicial capacity; and second, when a judge acts in the complete absence of all jurisdiction. *Mireles v. Waco*, 111 S.Ct. 186, 188 (1991). Constant's repeated but unspecified allegations of fraud and conspiracy do not pierce this defense.

Constant has repeatedly attempted to overcome judicial immunity by alleging that the Defendants acted in the complete absence of all jurisdiction. However, he has not alleged any facts that demonstrate a complete lack of jurisdiction, nor could he. Constant's allegations are based on the theory that a defendant must establish an independent cause of action, and independent jurisdiction, to properly file a summary judgement or dismissal motion. He concludes that any judge who disposes of a case through a pretrial motion does so in the complete absence of jurisdiction because the "merits" of the claim have not been reached. Mr. Constant is simply wrong.

Constant's Complaint also demands various forms of in-

junctive relief. Constant argues that the doctrine of judicial immunity cannot bar injunctive relief actions against judges acting in their official capacity, citing *Pulliam v. Allen*, 104 S.Ct. 1970 (1984). However, as noted in the Dismissal Order, *Pulliam* applies only to Section 1983 cases not to *Bivens*-type cases. *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385 (9th Cir. 1987).

Constant has not stated facts which could pierce the defense of judicial immunity, nor could he do so consistently with this Complaint. Therefore, the Complaint is DISMISSED WITH PREJUDICE.

C. RES JUDICATA

Had the defense of judicial immunity failed, Constant would nevertheless have been estopped under the doctrine of res judicata from collaterally attacking past judgements by reasserting claims and issues that have already been adjudicated. See Restatement (Second) of Judgement 13 (1982). Like the claims discussed in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, Constant's allegations here are poorly masked attempts to revisit and reverse his past defeats. "Even though an action has an independent purpose and contemplates some other relief it is a collateral attack if it must in some fashion overrule a previous judgement." *Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972). (The preclusive effects of Constant's earlier lawsuits are discussed in greater detail in *In Re Constant (Constant v. Wilson)*, CV-92-0409-RSWL.)

Now, in addition to being estopped by his previous cases

against other defendants, Constant is estopped by this Court's dismissal with prejudice of his claims against these ten Defendants in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL. Claim preclusion bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the parties. . . ." *McClain v. Apodaca*, 793 F.2d 1031, 1033 (9th Cir. 1986). Since Mr. Constant could have brought these claims against the Defendants in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, he is estopped from asserting them now. Constant's objections to res judicata in this case are identical to those already rejected by this Court. Therefore, this Complaint is barred by res judicata.

D. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In addition to being invalid for the reasons discussed above, each of the "Counts" of the Complaint fails to state any claims upon which relief may be granted. Constant's claims continue to spring from his convoluted interpretation of federal civil procedure and the Constitution. The heart of all of his arguments is the idea that his rights have been violated when his invalid claims are dismissed or summarily judged before trial. Like the claims discussed in *In re Constant (Constant v. Wilson)*, CV-92-0409-RSWL, these claims are bizarre and inaccurate, and warrant dismissal. See *Ex Parte Peterson*, 40 S.Ct. 543 (1920).

III. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss is GRANTED, and the Complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: July 30, 1992

RONALD S.W. LEW
United States District Judge

CV-92-2018-RSWL, *Constant v. Wilson, et. al.*, Defendants' Motion to Dismiss.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JAMES CONSTANT,	)	No.92-55891
	)	
Debtor,	)	D.C. No.
	)	CV-92-0409-RSWL
	)	Central California
	)	(Los Angeles)
JAMES CONSTANT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STEPHEN V. WILSON, District Judge; MANUEL REAL, Chief District Judge; ROBERT P. AGUILAR; OSCAR DAVIS; WILSON COWEN, Judge; EDWARD SMITH; HELEN NIES; PAULINE NEWMAN; HOWARD MARKEY; PAUL MICHEL; UNITED STATES OF AMERICA,	)	
	)	
Defendants-Appellees.	)	
	)	

In re: JAMES CONSTANT,	)	No. 92-56045
	)	
Debtor,	)	D.C. No.
	)	CV-92-1394-RSWL
	)	Central California
	)	(Los Angeles)
JAMES CONSTANT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STEPHEN V. WILSON,	)	
District Judge;	)	
MANUEL REAL,	)	
Chief District Judge;	)	
ROBERT P. AGUILAR;	)	
OSCAR DAVIS;	)	
WILSON COWEN, Judge;	)	
EDWARD SMITH;	)	
HELEN NIES;	)	
PAULINE NEWMAN;	)	
HOWARD MARKEY;	)	
PAUL MICHEL;	)	
UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendants-Appellees.	)	
_____	)	

JAMES CONSTANT,	)	No. 92-55995
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-92-2018 RSWL
v.	)	Central California
STEPHEN V. WILSON,	)	(Los Angeles)
District Judge;	)	
MANUEL REAL,	)	
Chief District Judge;	)	
ROBERT P. AGUILAR;	)	
OSCAR DAVIS;	)	
WILSON COWEN, Judge;	)	
EDWARD SMITH;	)	
HELEN NIES;	)	
PAULINE NEWMAN;	)	
HOWARD MARKEY;	)	
PAUL MICHEL;	)	
UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendants-Appellees.	)	

Before: SCHROEDER, D.W. NELSON, and THOMPSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RULE 54 Judgement Upon Multiple Claims Or Involving Multiple Parties

(b) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgement as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of the parties.

28 USC 1338 Patents

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, ...

28 USC 1331 Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 USC 1343 Civil Rights

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a Citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42.

2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent.

28 USC 1334 Bankruptcy Cases And Proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have jurisdiction of all cases under title 11.

28 USC 157(b) Procedures

(2) Core proceedings include ... (B) allowance or disallowance of claims against the estate or exemptions from property of the estate ...; (C) counterclaims by the estate against persons filing claims against the estate.

Amendment V United States Constitution

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.